

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	
UNITED STATES COAST GUARD	:	
	:	DECISION OF THE
vs.	:	
	:	COMMANDANT
LICENSE NO. 693595 and MERCHANT	:	
MARINER'S DOCUMENT 435 92 8814	:	ON APPEAL
	:	
Issued to: Daniel J. Callahan, Appellant	:	NO. 2578
	:	

---

This appeal is taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By order dated December 14, 1994, an Administrative Law Judge of the United States Coast Guard at Morgan City, Louisiana, revoked Appellant's License and Document based upon finding proved the charge of *misconduct*. The three specifications supporting the charge alleged that on or about March 23, 1994, Appellant wrongfully (1) refused to provide a specimen for a post incident drug test, (2) failed to obey an order of the master regarding the navigation of the vessel, and (3) departed the vessel without being relieved as the licensed mate.

The hearing was held at Morgan City, Louisiana, on October 5, 1994. Appellant was represented by professional counsel and entered a response denying the charge and all specifications.

The Coast Guard Investigating Officer introduced into evidence the testimony of three witnesses. In defense, Appellant offered into evidence one exhibit and testified on his own behalf. The Administrative Law Judge admitted two additional exhibits on the record.

At the end of the hearing, the Administrative Law Judge rendered an oral Decision and Order (D&O) concluding that the charge and all specifications were found proved and revoking

Appellant's License and Merchant Mariner's Document. On December 14, 1994, the Administrative Law Judge issued his written order.

Appellant filed a timely appeal on December 30, 1994, and completed his appeal on March 29, 1995. Therefore, this appeal is properly before the Commandant for review.

APPEARANCE: Appellant, *pro se*.

### FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned License and Document. Appellant's License authorized service as a master on Great Lakes and inland steam or motor vessels of not more than 1600 gross tons. On the afternoon of March 23, 1994, Appellant assumed duties as the licensed mate on board the M/V H.O.S. CARRY BACK, an offshore supply vessel owned and operated by Hornbeck Offshore Services. The vessel was moored on the Atchafalaya River at Berwick, Louisiana, under the supervision of Captain Anderson, the master. On that same afternoon, the vessel had to be turned around. Appellant requested to perform the maneuver, which Captain Anderson allowed. Due to the strong currents in the river and the close proximity of the Highway 182 bridge, Captain Anderson told Appellant to first proceed upriver, and then turn the vessel around. Instead of complying, Appellant headed the vessel broadside to the current which quickly set the vessel toward the bridge. Captain Anderson then took control of the vessel, however, the mast of the vessel still struck the bridge. The vessel sustained damage to the mast and navigation lights; there was no damage to the bridge. Once the vessel was safely at the pier, Captain Anderson reported the incident to the Hornbeck office. The company representatives, Mr. Arnouville and Mr. McCuen, arrived at the vessel shortly thereafter. They both instructed Appellant to remain at the vessel until a chemical test could be arranged. In spite of these instructions, the Appellant departed the scene without being tested or properly relieved as licensed mate of the M/V H.O.S. CARRY BACK.

The vessel's mast and navigation lights were repaired the next day and the vessel returned to service.

### BASES OF APPEAL

From the Appellant's brief, I am able to identify the following bases of appeal from the decision of the Administrative Law Judge:

1. The evidence was insufficient to sustain the allegations of refusal to submit to a drug test because the Appellant's employer did not meet the regulatory guidelines for post incident drug testing;
2. The evidence was insufficient to sustain the allegations of failure to obey an order and departing without being relieved; and
3. In the alternative, the order of revocation for misconduct is excessive and harsh, and should be reevaluated.

### OPINION

#### I

Appellant alleges that the first specification is not proved because his employer was in violation of two of the regulations governing post incident drug testing, 46 C.F.R. 16.240 and 33 C.F.R. 95.035. I disagree.

Before proceeding to the merits, I find it necessary to clarify the jurisdictional basis of the first specification. Appellant was charged with *misconduct* for "wrongfully refus[ing] to provide a specimen for a required post accident chemical test ordered by your marine employer . . . in accordance with 33 CFR 95.035(a)(1)." This specification implies that the Appellant was in violation of 33 C.F.R. 95.035, a regulation that establishes guidelines and procedures for reasonable cause drug testing by marine employers. An employee cannot violate a regulation which merely prescribes procedures for his employer to follow. *Cf. Appeal Decision 2551 (LEVENE)* (mariner cannot violate 33 C.F.R. 95.040 which prescribes a rule of evidence).

Therefore, a violation of 33 C.F.R. 95.035 cannot be the basis for Appellant's misconduct under the first specification.

My remaining concern with the first specification is that the Administrative Law Judge also considered Appellant to be in violation of 46 C.F.R. 16. [D&O at 3, 6]. That regulation establishes requirements for employers to conduct: (1) random chemical tests; (2) chemical tests following a serious marine incident; and (3) reasonable cause chemical tests upon suspicion of drug use. 46 C.F.R. 16.230-16.250. Since this regulation only applies to marine employers, it also cannot be the basis for Appellant's misconduct under the first specification.

Although the specification may have been inartfully worded, this does not necessarily constitute reversible error. "Findings leading to an order of suspension or revocation of a document can be made without regard to the framing of the original specification as long as the Appellant has actual notice and the questions are litigated." Appeal Decision 2422 (GIBBONS), citing Kuhn v. Civil Aeronautics Board, 183 F.2d 839, (D.C. Cir. 1950); Appeal Decision 1792 (PHILLIPS). The record clearly shows that the Appellant understood which act constituted the basis for the *misconduct* charge, namely, his failure to follow an order of his employer to undergo a chemical test after being directly involved in a marine casualty. This is the offense that was actually litigated by the parties, regardless of the deficiency in the specification. Furthermore, Appellant did not object to the wording of the specification, either at the hearing or on appeal. Therefore, there was no prejudice to Appellant and the specification need not be set aside on this error. Appeal Decision 2386 (LOUVIERE).

On the merits, Appellant asserts that his employer did not have reasonable cause to require him to submit to a chemical test under 33 C.F.R. 95.035. In the instant case, two elements are required to establish reasonable cause: direct involvement and the occurrence of a marine casualty. 33 C.F.R. 95.035(a)(1). The Administrative Law Judge found both elements present. [D&O at 7]. The Appellant only challenges the finding that he was directly involved.

The reasonable cause regulation does not provide a definition of "directly involved" for the purposes of a marine casualty. However, Coast Guard regulations that govern the reporting

and investigation of marine casualties define an individual directly involved in a *serious* marine incident as one whose action or failure to act cannot be ruled out as a possible cause of the incident. 46 C.F.R. 4.03-4. Although on its face this definition applies to serious marine incidents, I see no reason to depart from this definition for the purposes of other marine casualties.

Appellant cites no legal or other authority to support his assertion that he was not directly involved. This authority is required by the regulations governing appeal procedures. 46 U.S.C. 5.703(d). Instead, Appellant merely reiterates his testimony from the trial and asserts that, because he was not on the controls at the exact time the vessel struck the bridge, he was not directly involved. Conversely, the Administrative Law Judge found that Appellant was directly involved in the incident, regardless of who was at the controls at the time the vessel struck the bridge. [D&O at 7]. The decision of whether Appellant was directly involved falls within the province of the Administrative Law Judge and his findings will not be overturned on appeal unless they are without support in the record or inherently incredible. Appeal Decisions 2542 (DEFORGE), 2424 (CAVANAUGH), 2423 (WESSELS), 2422 (GIBBONS). Appellant has made no such showing here.

Appellant also contends that his employer violated 33 C.F.R. 95.035 in that other crew members directly involved in the casualty were not tested. Whether or not the employer complied with the regulations regarding testing of other individuals is outside the scope of this review, and has no bearing on the issue of misconduct by the Appellant.

## II

Appellant also asserts that the evidence in the record does not support the second and third specifications. I disagree.

Appellant again offers no legal or other authority to support his assertion and reiterates his testimony from the hearing while alleging that Captain Anderson's testimony is incredible. In regards to the second specification, the Administrative Law Judge heard the testimony of

Captain Anderson and Appellant and determined that Captain Anderson's testimony was more credible. [D&O at 9]. In regards to the third specification, the Administrative Law Judge chose to believe the testimony of the three witnesses who testified that Appellant was not relieved of his duties when he left the vessel, instead of Appellant's claim that Captain Anderson told him he could leave after completing the drug test.<sup>1</sup> [Transcript (TR) at 54, 77-78, 90-91, 115]. It is

---

<sup>1</sup> Even if the Administrative Law Judge found Appellant's testimony to be credible, the contradictions in Appellant's argument are fatal to the appeal of the third specification. Under the Appellant's version, he would have been properly relieved only after completion of the chemical test. However, Appellant admitted to leaving before the chemical test was administered. [TR at 119].

well established that questions involving the credibility of a witness are best decided by the Administrative Law Judge who presides at the hearing. Appeal Decisions 2017 (TROCHE), *aff'd* NTSB Order No. EM-49 (1976); 2253 (KIELY); 2279 (LEWIS); 2290 (DIGGINS); 2395 (LAMBERT). The Administrative Law Judge's determination will be upheld absent a showing that he was arbitrary or capricious. *Id.* Appellant makes no such showing here.

### III

In the alternative, Appellant asserts that the revocation order was excessive and harsh. I disagree. The order imposed is exclusively within the Administrative Law Judge's discretion and I will not modify it unless it is clearly excessive or an abuse of discretion. Appeal Decisions 2423 (WESSELS); 2414 (HOLLOWELL); 2391 (STUMES). Appellant makes no such showing here.

The Appellant believes that suspension was the fair and appropriate order and he implies, without offering any authority, that a suspension is the typical outcome. Appellant may be referring to the table of suggested ranges of appropriate orders found at 46 C.F.R. 5.569(d). However, this table is only intended for information and guidance, and is not binding on the Administrative Law Judge. Appeal Decisions 2414 (HOLLOWELL); 2362 (ARNOLD). An Administrative Law Judge has wide discretion to formulate an order adequate to deter the Appellant's repetition of the violations he was found to have committed. Appeal Decision 2475 (BOURDO); *Cf. Federal Trade Comm'n v. Henry Broch & Co.*, 368 U.S. 360 (1962) (an agency has wide discretion to formulate a remedy to prevent repetition of violations).

The Decision and Order indicates that the Administrative Law Judge considered the relevant factors in formulating his order. [D&O at 7-8]. Of paramount concern is the safety of life at sea and the welfare of individual seaman. Appeal Decision 2017 (TROCHE), *aff'd* NTSB Order No. EM-49 (1976). Refusal to submit to a post incident chemical test raises a serious doubt about a mariner's ability to perform safely and competently in the future. Furthermore, if mariners could refuse to submit to chemical testing and face a lesser Order, it is difficult to

imagine why anyone that may have used drugs would ever consent to be tested. *Cf. Exxon Shipping Co. v. Exxon Seaman's Union*, 73 F.3d 1287 (3d Cir. 1996) (reinstatement of employee after he refused to submit to reasonable cause testing violates public policy because it undercuts Coast Guard regulations). The Administrative Law Judge considered these factors, as well as Appellant's previous record, and determined that revocation was the appropriate remedy to ensure maritime safety, to guarantee the effectiveness of the drug testing program and to prevent potential abuse by the Appellant in the future. [D&O at 7-8]. In this case, his Order is not clearly excessive or an abuse of discretion.

Appellant states he is willing to undergo a drug or alcohol abuse treatment program to get his license back and requests this be considered in mitigation on appeal. However, a mere willingness to undergo treatment is not a mitigating factor. Appellant is apparently referring to the requirements for the issuance of a new license found in 46 C.F.R. 5.901. These regulations require certain procedures before one can apply for a new license after a previous revocation. Appellant must first comply with these regulations and then he may apply for the reissuance of his license.

### CONCLUSION

Subject to my comments on the first specification, the findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The inartful wording of the first specification was harmless error. Furthermore, the hearing was conducted in accordance with applicable laws and regulations.

### ORDER

The Decision and Order of the Administrative Law Judge, dated December 14, 1994, is **AFFIRMED**.

CALLAHAN

R. D. HERR  
Vice Admiral, U.S. Coast Guard  
Acting Commandant

Signed at Washington, D.C. this 22nd day of July, 1996.